

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SONY BMG MUSIC
ENTERTAINMENT, et al,

Plaintiffs,

v.

BRITTANY RAQUEL GRAY

Defendant.

No. C 07-4854 WDB

**ORDER FOR REASSIGNMENT AND
REPORT AND
RECOMMENDATION RE
APPLICATION FOR DEFAULT
JUDGMENT**

Plaintiffs Sony BMG Music Entertainment, Arista Records LLC, Interscope Records, BMG Music, UMG Recordings, Inc., and Warner Bros. Records, Inc., are copyright owners or licensees with respect to certain copyrighted sound recordings. Complaint, filed February 4, 2008, at 1-2. Defendant Brittany Gray is an individual residing in Daly City, California. *Id.*

On February 4, 2008, plaintiffs filed their complaint against Ms. Gray alleging that plaintiffs are the owners of copyrights in eight identified sound recordings ("Copyrighted Recordings") and that Ms. Gray has violated and continues to violate exclusive rights granted to plaintiffs in violation of the Copyright Act. See, Complaint at 3 and Ex. A. Specifically, plaintiffs allege that Ms. Gray has violated plaintiffs' exclusive rights to reproduce and to distribute the

1 Copyrighted Recordings by using the internet to download from and/or upload to a
2 "peer to peer" file sharing network. 17 U.S.C. §106(1) and (3); Complaint at 2-3.

3 Plaintiffs served Ms. Gray with a copy of the Complaint on February 24,
4 2008. See, Proof of Service filed March 10, 2008.

5 In response to plaintiffs' application for entry of default, the Clerk of the
6 Court entered default as to Brittany Raquel Gray on June 4, 2008.

7 On July 21, 2008, plaintiffs filed and served their Motion for Default
8 Judgment Against Defendant Brittany Raquel Gray ("Motion"). See, Proof of
9 Service, attached to Motion. Plaintiffs notified defendant that this Court would
10 conduct a hearing on September 10, 2008, in connection with the Motion for
11 Default Judgment. Motion at 1.

12 On September 10, 2008, the Court conducted a hearing in connection with
13 plaintiffs' Motion. No appearance was made on behalf of defendant.

14 Plaintiffs seek judgment against Ms. Gray in the amount \$6,000.00,
15 representing statutory damages for copyright infringement of eight works and costs
16 in the amount \$420. 17 U.S.C. §§504 and 505. See also, Declaration of Dawniell
17 Alise Zavala, filed July 21, 2008, ("Zavala Decl.") at 16; Motion at 7-8 and 13.
18 Plaintiffs also ask the Court to issue a permanent injunction prohibiting Ms. Gray
19 from infringing plaintiffs' rights in copyrighted recordings owned by plaintiffs now
20 or in the future and directing Ms. Gray to destroy all copies of plaintiffs' recordings
21 that defendant has downloaded without authorization. 17 U.S.C. §§502(a) and
22 503. See also, Complaint at 4.

23 Because defendant Brittany Gray has not appeared in this action, this Court
24 has not secured consent as required by 28 U.S.C. §636(c). Accordingly, we make
25 the following Report and Recommendation and ORDER the Clerk of the Court to
26 randomly reassign this action to a District Judge.

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1 **I. Entitlement to Entry of Default Judgment**

2 Plaintiffs seek entry of judgment by default against Brittany Raquel Gray.
3 Plaintiffs served defendant with their motion for default judgment. See,
4 Proof of Service, filed on July 21, 2008.

5 Ms. Gray has failed to respond to the Complaint or otherwise to appear in
6 the proceedings, and the Clerk of the Court entered default as to this defendant.

7 Plaintiffs' counsel has communicated directly with Ms. Gray, who is aware
8 of this action yet still has chosen not to appear. Zavala Decl., at ¶8-12. This fact
9 supports a finding that Ms. Gray has chosen not to defend this action and strongly
10 supports plaintiffs' request for judgment by default.

11 To demonstrate direct infringement plaintiffs must satisfy two requirements:
12 (1) they must prove ownership of the copyright and (2) they must prove that
13 defendant's conduct violates at least one exclusive right granted under 17 U.S.C.
14 §106. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir 2001). By
15 failing to respond to plaintiffs' Complaint, defendant admits all of the well-pleaded
16 allegations of the Complaint relating to liability. Plaintiffs have alleged that they
17 are the owners of copyrights in the eight sound recordings listed in Exhibit A to the
18 Complaint. Plaintiffs also allege that defendant has used "a [peer to peer] network
19 to download and/or distribute to the public the Copyrighted Recordings."
20 Complaint at 3. Moreover, plaintiffs have produced evidence indicating that their
21 investigator, MediaSentry, Inc., was able to obtain a list of sound recordings
22 offered by defendant to the public and that MediaSentry actually downloaded the
23 eight sound recordings at issue. Plaintiffs' evidence, uncontradicted by virtue of
24 defendant's default, establishes the substantive merits of plaintiffs' claim that
25 defendant distributed the Copyrighted Recordings to the public.

26 The Court also finds that there is a significant risk of prejudice to plaintiffs if
27 their Motion is denied. Use of the internet to distribute copyrighted sound
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1 recordings via file sharing has the potential to cause widespread damage to
 2 plaintiffs' rights. Ms. Gray may have infringed plaintiffs' rights in additional
 3 copyrighted recordings (beyond the eight at issue in the Complaint) and has not
 4 presented any basis for a belief that she has ceased participating in file sharing over
 5 a peer to peer network. Zavala Decl., at ¶3; Transcript of September 10, 2008
 6 hearing. These contentions are un rebutted by Ms. Gray.

7 The evidence supports a finding that Ms. Gray is not a minor or otherwise
 8 incompetent and is not on active duty military service. Zavala Decl., at ¶15. Given
 9 Ms. Gray's knowledge of plaintiffs' claims and of these proceedings, her complete
 10 failure to appear, and the significant risk of prejudice to plaintiffs resulting from
 11 the alleged breach, the sufficiency of plaintiffs' complaint, and the apparent merit
 12 of plaintiffs' substantive claim, we RECOMMEND that the District Judge to whom
 13 this case is reassigned find that plaintiffs are entitled to judgment by default against
 14 Brittany Raquel Gray. See, F.R.C.P. 55(b); Eitel v. McCool, 782 F.2d 1470 (9th
 15 Cir. 1986).

16 17 **II. Specific Items of Relief Sought by Plaintiffs**

18 **A. Statutory Damages under the Copyright Act**

19 Plaintiffs may collect, at their election, either actual damages or statutory
 20 damages. 17 U.S.C. §504. Plaintiffs have elected to recover statutory damages.
 21 Motion at 4 and 7-8. The Copyright Act provides for statutory damages in an
 22 amount not less than \$750.00 and not more than \$30,000.00 per infringed work. 17
 23 U.S.C. §504(c)(1). Plaintiffs seek the minimum statutory damages of \$750.00 for
 24 each of the eight infringed works, i.e., \$6,000.00.¹ Motion at 7-8.

25
 26 ¹Plaintiffs allege that defendant's infringement was willful. Complaint at ¶19. Pursuant
 27 to 17 U.S.C. §504(c)(2), the Court may award statutory damages up to \$150,000.00 where
 28 plaintiff has proven willfulness. Because plaintiffs seek only the minimum statutory damages,
 the Court need not consider the allegations of willfulness.

1 Plaintiffs have presented evidence, uncontradicted by virtue of defendant's
2 default, that would support a finding that defendant has infringed plaintiffs' rights
3 in eight copyrighted works. Complaint at 2-4 and Ex. A; Zavala Decl., at ¶5.

4 Accordingly, we RECOMMEND that the District Judge to whom this case is
5 reassigned enter a judgment for plaintiffs and against defendant Brittany Gray that
6 includes statutory damages totaling \$6,000.00 (six thousand dollars).

7
8 **B. Costs**

9 The Copyright Act confers in the Court discretion to award a prevailing
10 plaintiff its costs including reasonable attorneys' fees. 17 U.S.C. §505. Plaintiffs
11 ask the Court to reimburse their costs in the amount \$420.00, reflecting the Court's
12 filing fee and the cost of obtaining personal service of the Summons and
13 Complaint. Zavala Decl., at ¶16. Plaintiffs do not seek reimbursement of their
14 attorneys' fees.

15 The items for which reimbursement is sought constitute taxable costs. Civil
16 L.R. 54-3(a). We may take judicial notice of the Court's filing fee. We also find,
17 based on the Court's extensive experience with litigants' requests for
18 reimbursement of costs, that the cost incurred to obtain personal service of the
19 Summons and Complaint is commensurate with rates charged by process servers in
20 the Bay Area.

21 Accordingly, we RECOMMEND that the District Judge to whom this case is
22 reassigned enter a judgment in favor of plaintiffs and against defendant Brittany
23 Gray that includes costs in the amount \$420.00 (four hundred twenty dollars).

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25 **C. Request for Permanent Injunction**

26 Plaintiffs ask the Court to enter judgment enjoining defendant Brittany Gray
27 from infringing plaintiffs' rights in current and future sound recordings and
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1 compelling defendant to destroy all copies of sound recordings that she has
 2 downloaded without authorization. 17 U.S.C. §502(a) and §503. See also, Olan
 3 Mills, Inc., v. Linn Photo Co., 23 F.3d 1345, 1349 (8th Cir. 1994) (courts enjoin
 4 infringement of future works where there has been history of continuing
 5 infringement and threat of future infringement remains).

6 Specifically, plaintiffs seek entry of the following injunction:

7 Defendant shall be and hereby is enjoined from directly or indirectly
 8 infringing Plaintiffs' rights under federal or state law in the
 9 Copyrighted Recordings and any sound recording, whether now in
 10 existence or later created, that is owned or controlled by Plaintiffs (or
 11 any parent, subsidiary, or affiliate record label of Plaintiffs)
 12 ("Plaintiffs' Recordings"), including without limitation by using the
 13 Internet or any online media distribution system to reproduce (i.e.,
 14 download) any of Plaintiffs' Recordings, to distribute (i.e., upload)
 15 any of Plaintiff's Recordings, or to make any of Plaintiffs' Recordings
 16 available for distribution to the public, except pursuant to a lawful
 17 license or with the express authority of Plaintiffs. Defendant also
 18 shall destroy all copies of Plaintiffs' Recordings that Defendant has
 19 downloaded onto any computer hard drive or server without
 20 Plaintiffs' authorization and shall destroy all copies of those
 21 downloaded recordings transferred onto any physical medium or
 22 device in Defendant's possession, custody or control.

23 Complaint at 4.²

24 Courts determining whether to issue a permanent injunction consider the
 25 following equitable factors: "(1) that [the plaintiff] has suffered an irreparable
 26 injury; (2) that remedies available at law, such as monetary damages, are
 27 inadequate to compensate for that injury; (3) that, considering the balance of
 28 hardships between the plaintiff and defendant, a remedy in equity is warranted; and
 (4) that the public interest would not be disserved by a permanent injunction."
eBay, Inc. v. MercExchange L.L.C., 547 U.S. 388 (2006) (claim for patent
 infringement).

²The text of the requested injunction set forth in plaintiffs' motion differs slightly from the version set forth in the Complaint. At the hearing on September 10, 2008, plaintiffs' counsel represented that the inconsistencies likely were unintentional and that the text set forth in the Complaint was satisfactory to plaintiffs. Transcript of September 10, 2008 hearing.

1 Plaintiffs have established liability by virtue of defendant's default. In the
2 case of file sharing over the internet damages are potentially widespread and
3 substantial. Moreover, damages for violation of these kinds of rights are inherently
4 difficult to value. While the magnitude of harm that internet file sharing
5 potentially could create is great and difficult to quantify, the risk of harm to
6 defendant that would be created by issuance of the injunction is small. Ms. Gray
7 will be required to pay a relatively modest amount to buy the music she wants.
8 Furthermore, the public interest in protecting copyrighted material in order to
9 encourage artistic expression will be served. Therefore, if plaintiffs have
10 demonstrated a significant threat of future violations this Court will recommend
11 that the injunction issue.³

12 Defendant has not appeared in this action. Although she responded to
13 plaintiffs' early efforts to contact her and apparently agreed to settle plaintiffs'
14 action, Ms. Gray never executed the settlement documents. Her refusal to execute
15 the settlement documents supports a concern that she might well intend to ignore
16 plaintiffs' requests that she cease violating their rights. Accordingly, neither
17 plaintiffs nor the Court can have any assurance that Ms. Gray will cease her
18 infringing behavior. In addition, the Court has been given no reason to conclude
19 that defendant has uninstalled from her computer the software that permits her to
20 file share sound recordings via the internet. Given all of these factors, the Court
21 concludes that plaintiffs have demonstrated a significant risk that defendant will
22 continue to violate the copyright laws by the unauthorized file sharing of plaintiff's
23 sound recordings over the internet.

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26 ³See, cases pre-dating eBay: MAI Systems Corp., v. Peak Computers, 991 F.2d 511, 520
27 (9th Cir. 1993) (Courts will grant a request for a permanent injunction under the Copyright Act
28 where there has been a showing of liability and a threat of future violations.); Sega Ent. Ltd., v.
MAPHIA, et al, 948 F.Supp. 923, 940 (N.D.Cal. 1996) (same).

We RECOMMEND that the District Judge enter the injunction set forth above and in the Compliant at 4:13-21.

III. Conclusion

The court ORDERS the Clerk of the Court to randomly reassign this action to a District Judge.

A copy of this court's Proposed Judgment is attached hereto.

We RECOMMEND that the District Judge to whom the Clerk reassigns this matter enter judgment in favor of plaintiffs and against defendant Brittany Raquel Gray for statutory damages and costs in the total amount of \$6,420.00 (six thousand four hundred twenty dollars).

We also RECOMMEND that the District Court enter the following injunction:

Defendant shall be and hereby is enjoined from directly or indirectly infringing Plaintiffs' rights under federal or state law in the Copyrighted Recordings and any sound recording, whether now in existence or later created, that is owned or controlled by Plaintiffs (or any parent, subsidiary, or affiliate record label of Plaintiffs) ("Plaintiffs' Recordings"), including without limitation by using the Internet or any online media distribution system to reproduce (i.e., download) any of Plaintiffs' Recordings, to distribute (i.e., upload) any of Plaintiff's Recordings, or to make any of Plaintiffs' Recordings available for distribution to the public, except pursuant to a lawful license or with the express authority of Plaintiffs. Defendant also shall destroy all copies of Plaintiffs' Recordings that Defendant has downloaded onto any computer hard drive or server without Plaintiffs' authorization and shall destroy all copies of those downloaded recordings transferred onto any physical medium or device in Defendant's possession, custody or control.

The Court ORDERS plaintiffs to promptly serve a copy of this Report and Recommendation on Brittany Raquel Gray.

IT IS SO REPORTED AND RECOMMENDED.

Dated: September 15, 2008


 WAYNE D. BRAZIL
 United States Magistrate Judge

Copies to: Plaintiffs with instructions to serve defendant, WDB, stats, Clerk.